SARI ARTISTS FILM PRODUCTIONS SDN. BHD. v. MALAYSIA FILM INDUSTRIES SDN. BHD.

[O.C.J. (Hashim Yeop A. Sani J.) January 31, 1974]

[Kuala Lumpur — Civil Suit No. 1195 of 1973]

Practice and Procedure — Injunction — Application to dissolve ex parte injunction — Material facts suppressed — No nexus between defendant and particular act or acts in respect of which injunction sought.

This was an application to dissolve an *ex parte* injunction restraining the defendant from distributing, screening or exhibiting an Indonesian film within Malaysia. In the application for the *ex parte* injunction reliance was placed on the order of an Indonesian court but it was not disclosed that that order had been stayed. It was also not disclosed that the defendant had denied distributing the film in Malaysia.

Held: (1) as it appeared that the plaintiff had suppressed material facts in his application for the *ex parte* injunction, the injunction must be dissolved;

(2) it had not been established that there was a connection between the defendant and the advertisements relating to the films and therefore as the injunction, if allowed to continue, would be futile and ineffective, it should be dissolved.

Cases referred to:-

(1) *Colt Industries Inc.* v. *Sarlie* [1966] 3 All E.R. 85.

(2) *Berliner Industriebank* v. *Jost* [1971] 2 All E.R. 1513.

(3) *Gan Realty Sdn. Bhd. & Ors.* v. *Nicholas & Ors.* [1969] 2 M.L.J. 110.

(4) *Clifton* v. *Robinson* 16 Beav. 355; 51 E.R. 816.

(5) *Hilton* v. *Lord Granville* 4 Beav. 137; 49 E.R. 290.

CIVIL SUIT.

Wong Weng Kwai for the plaintiff.

D. Puthucheary for the defendant.

Hashim Yeop A. Sani J.: This is an application to dissolve the *ex parte* injunction granted on the 24th of November, 1973, restraining the defendant from distributing, screening or exhibiting within Malaysia the feature film "Singa Betina Dari Marunda" or any similar feature film carrying the same or identical title.

The evidence relied on in granting the injunction consisted of the affidavit of one K. Abu Bakar, the managing director of P. T. Golden Imperial Trading Coy, a limited company incorporated in Indonesia, and the affidavit of one Yusoff bin Majid, the managing director of the plaintiff company. In the affidavit of K. Abu Bakar, it is stated that by an order of court of the Pengadilan Negeri, Jakarta Pusat, Indonesia, made on 10th April, 1973, one P. T. Sumandra Film Corporation, in the name of the director, Abdurahman Sutrisno Sudomo, became and was declared the rightful owner of all negatives and/or copies of the feature film concerned. According to the same affidavit, P. T. Sumandra Film Corporation of Indonesia by authorisation gave P. T. Golden Imperial Trading Coy the sole right to print features and trailers of the said film for distribution and use in the territories of Malaysia, Singapore and Brunei. By an agreement in writing between these two last mentioned companies, the sole right and licence to distribute and exhibit the film concerned was assigned to P. T. Golden Imperial Trading Coy. Finally, by another agreement dated 18th May, 1973, made between the latter company and the plaintiff, the plaintiff was granted the sole right to distribute and exhibit the same feature film in Malaysia, Singapore and Brunei for five years commencing from 15th May, 1973. In the affidavit of Yusoff bin Majid, he confirms that the plaintiff company has the sole right as described and further depones that the defendant has obtained a copy of an identical feature film and has publicly caused to exhibit or exhibited the film in Jerantut during the period of 27th to 29th October, 1973, and then in Alor Star from 4th November, 1973, thereby infringing the sole right of the plaintiff company. Annexed to the affidavit of Yusoff bin Majid are two photostat copies of the alleged advertisement of the film appearing in the *Utusan Melayu* and the *Sunday Star* respectively.

In the application to dissolve the injunction, the defendant company is relying firstly, on their statement of defence filed on the 24th December, 1973, and the affidavit of one Jaffar bin Abdullah, the general manager of the defendant company, affirmed on 11th December, 1973, wherein they denied all allegations and that they had nothing to do with the advertisement. Also relied on by the defendant company is the affidavit of one Lee Keng Choon, who is the manager in Peninsular Malaysia of Messrs. Chop Lim Chee Siong of No. 9, Main Street, Limbang, Sarawak, who claims that by an agreement reached between Messrs. Chop Lim Chee Siong and one Andry Agus of Jalan Bungur Besar XV/6 Jakarta, Indonesia, the said Lim Chee Siong was granted the sole right to distribute and exhibit the film "Singa Betina Dari Marunda" in Singapore and Malaysia. The affidavit of Lee Keng Choon also annexes copies of the agreements. The affidavit also disputes the right of P. T. Sumandra Film Corporation to distribute or exhibit the said film "except in Jawa Tengah and Jogjakarta" as expressed in the copies of the agreements annexed. The affidavit also discloses that the Order of Court of Pengadilan Negeri Jakarta Pusat, Indonesia made on the 10th April, 1973, and referred to in the affidavit of K. Abu Bakar, has been stayed by an order of the Ketua Pengadilan Tinggi, Jakarta on 30th August, 1973. A copy of that Order is annexed to the affidavit.

Counsel for the defendant company cited *Colt Industries, Inc.* v. *Sarlie*(1) and *Berliner Industriebank* v. *Jost*(2) as authority for the proposition that since the Indonesian court order in this case was not a conclusive one due to the appeal and Order of Stay, the legal right of the plaintiff can no longer be presumed. Counsel for the plaintiff company, on the other hand, reiterated in his submission that the plaintiff had established a *prima facie* case for the grant of an injunction and the circumstances have not changed, probably relying on *Gan Realty Sdn. Bhd. & Ors.* v. *Nicholas & Ors.*,(3) which was upheld by the Federal Court.

After going through the affidavits, I find that it is clear that the following facts were not disclosed when the plaintiff applied for the injunction on 24th November, 1973, namely: —

(a) The order of the Indonesian Court from which the right of the plaintiff was alleged to flow had been appealed against and therefore was inconclusive. The order of the Indonesian Court concerned was made on 10th April, 1973. The Order of Stay was made on 30th August, 1973. The affidavit of K. Abu Bakar was affirmed on 9th November, 1973. The affidavit of Yusoff bin Majid, the managing

director of the plaintiff company, was affirmed on the 16th November, 1973. The plaintiff should have ascertained that the facts disclosed to the court reflected the true state of affairs at that time.

(b) In the affidavit of Yusoff bin Majid at paragraph 5, it is stated that "in spite of a notice sent to the defendant, through my company's solicitors, M/s. Mah-Kok & Din, dated 5th November, 1973, notifying them to stop distributing, screening and exhibiting the said identical feature film in public, the defendant failed and/or refused and still fails and/or refuses to comply with the said request". However, in the supplementary affidavit of Jaffar bin Abdullah, the general manager of the defendant company, affirmed on 16th January, 1974, it was stated that a reply had in fact been made by the defendant company on 12th November, 1973 and a copy of which was annexed to the affidavit and which read as follows: —

"We thank you for your letter of 5th November, 1973 but were surprised to note a statement from you stating that 'you have distributed the said film in West Malaysia illegally...'. We wish to say that at no stage we have distributed the above said film and would demand an apology from your clients for making such statement or else we would take legal action against your clients."

Again it can be seen that the plaintiff did not take sufficient care to ascertain the true position of the facts on the date of hearing of the application which was on the 24th November, 1973.

The granting of an injunction is a discretion of the court. It is essential that the party asking the court to exercise its discretion makes available to the court all facts which might be material for the consideration of the court before exercising its discretion. In *Clifton* v. *Robinson*,[4] it was held that the fact that the plaintiff had forgotten the circumstance was no excuse for the suppression of a material fact in an application for an *ex parte* injunction. In *Hilton* v. *Lord Granville*,[5] the Master of the Rolls (Lord Langdale) succinctly described the duty of the plaintiff when asking for an injunction:

"The rights asserted on the part of the plaintiff and of the defendant are legal rights; and the plaintiff, asking for the assistance of a Court of Equity to protect him from a violation of his alleged legal right, ought to shew that the right has been established, or that, having had no means of establishing it, but the right being *prima facie* well founded, the interference of this court is necessary, to prevent that species and extent of mischief, which this court calls irremediable, before the right can be established by legal proceedings. In this case, it appears that the plaintiff, personally, has not had any opportunity of establishing his right at law; and, therefore, the question is, what is the result of the evidence now adduced, as to the right which he claims, and as to the nature and extent of damage, with which he is threatened, if his claim of right appears to be well founded."

It was held that where a plaintiff, upon an application for an *ex parte* injunction, suppresses material facts, the injunction will be dissolved on that ground alone.

Finally, an injunction is an order of the court to the party addressed to refrain from doing a particular act. It is imperative therefore for the plaintiff in order to justify the continuance of the injunction to show some connection between the defendant and the particular act or acts in respect of which the injunction was sought. It has come to light now that on the evidence that is available before the court, connection has not been sufficiently established between the defendant and the advertisements contained in exhibits "YM-1" and "YM-2" of the affidavit of Yusoff bin Majid. There is no reference to the defendant company in "YM-2" and reference to the defendant company in "YM-1" is misleading as it is confined only to another film not connected with the film in question.

On the above grounds, the injunction, if allowed to continue, would be futile and ineffective. I therefore order that the injunction be dissolved.

Costs to the defendant in any event.

Application granted.

Solicitors: *Mah-Kok & Din; Skrine & Co.*